80-662
CASE NO.

Supreme Court, U. S.
FILED
21
OCT 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ROBERT C. SULLIVAN,
Agent for Pipe Fitter Claimants,
Plaintiff-Appellant,

vs.

KAISER ENGINEERS, INC.,
and
OBERLE-JORDRE ENGINEERING AND ERECTORS,
and
POWER PIPING, INC.,
and
BOARD OF REVIEW, OHIO BUREAU OF EMPLOYMENT SERVICES,
and
ALBERT G. GILES, Administrator
Ohio Bureau of Employment Services,
Defendants-Appellees.

On Appeal From
The Supreme Court of Ohio

JURISDICTIONAL STATEMENT

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THE QUESTION PRESENTED

Are the due process and equal protection guarantees of the 14th Amendment to the Constitution of the United States violated by the Ohio Supreme Court's dismissal of appellant's appeal for lack of subject matter jurisdiction under the following circumstances:

1. Chapter 41 of the Ohio Revised Code provides for an appeal procedure for contesting the allowance or denial of unemployment compensation claims, wherein an appeal may be taken from the decision of the state Administrator to a referee of the state Board of Review, to the state Board of Review, to a state-county Court of Common Pleas, to a state-district Court of Appeals, to the state Supreme Court.

2. Ohio Revised Code, § 4141.28 (O) provides, in part, that in appealing a decision of the Board of Review, Ohio Bureau of Employment Services, to the Court of Common Pleas, "such appeal shall be taken . . . by filing a notice of appeal with the Clerk of the Court of Common Pleas, with the Board, and upon all appellees by registered mail to their last known post office address."

3. After the initial allowance of appellant's unemployment claims by the Administrator was reversed by the referee of the Board of Review, appellant filed timely notices of appeal with each review tribunal prescribed by the applicable state law.

4. In addition to providing registered mail notice of the filing of the notice of appeal to the Court of Common Pleas to each employer-appellee and to the

state Board of Review, who were the parties named by the employer-appellees in their appeal from the Administrator's decision allowing the claim, appellant sent registered mail notice to the Administrator, although the service of notice upon the Administrator was not noted on the certificate of service of appellant's notice of appeal to Common Pleas Court.

5. At the time appellant filed his notice of appeal, no Ohio Supreme Court decision had ever held that service of the notice of appeal upon the Administrator was jurisdictional.

6. The Court of Common Pleas and the Court of Appeals affirmed the decision of the Board of Review denying appellant benefits.

7. Upon appeal to the Ohio Supreme Court, the Supreme Court granted appellant's motion to certify the case as being one of great public and general interest.

8. In the Supreme Court, briefs were filed by all employer-appellees and by the Administrator and the Board of Review.

9. In March of 1980, the Supreme Court heard oral argument and took the case under submission for decision on the merits, no objection ever having been raised to the jurisdiction of the Court to hear and decide the appeal.

10. On April 16, 1980, the Ohio Supreme Court decided a case called *In re Claim of King*, 62 Ohio St. 2d 87, which held for the first time in Ohio that failure to serve a copy of a notice of appeal upon the Administrator was a jurisdictional defect.

11. Shortly thereafter, the appellees filed a motion in the Ohio Supreme Court to dismiss appellant's appeal, alleging that appellant had failed to serve the Administrator with a copy of the notice of appeal to the Court of Common Pleas because such service was not so stated on the notice of appeal.

12. In opposing the motion to dismiss, appellant filed an affidavit and copies of postal receipts establishing the actual fact of service upon the Administrator, even though it was not legally required at the time.

13. The Administrator never denied receiving actual notice of the appeal at any stage of the proceedings.

14. Appellant was given no opportunity for a hearing with access to discovery procedures in order to prove actual service upon the Administrator.

15. After years of extensive briefs and the incurrence of substantial expenses by all the parties to the appeal, the Supreme Court granted the motion to dismiss without any reference to appellant's offer of proof of actual service of a copy of the notice of appeal upon the Administrator.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

CASE NO.

ROBERT C. SULLIVAN,
Agent for Pipe Fitter Claimants,

Plaintiff-Appellant,

vs.

KAISER ENGINEERS, INC.,

and

OBERLE-JORDRE ENGINEERING AND ERECTORS,

and

POWER PIPING, INC.,

and

BOARD OF REVIEW, OHIO BUREAU OF EMPLOYMENT SERVICES,

and

ALBERT G. GILES, Administrator
Ohio Bureau of Employment Services,

Defendants-Appellees.

On Appeal From
The Supreme Court of Ohio

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The per curiam opinion of the Ohio Supreme Court entered June 11, 1980, motion for rehearing denied July 24, 1980, is reported as *Sullivan* v. *Kaiser Engineers, Inc.*, 62 Ohio St. 2d 304, — N.E.2d — (1980). That opinion is set forth in the Appendix together with the opinion of the Court of Appeals, First Appellate District of Ohio in Case No. C-77756 (filed June 20, 1979), the opinion of the Court of Common Pleas, Hamilton County, Ohio, in consolidated cases No. A7609115, A7609305, and A7609312 dated August 25, 1977, the decision of the Board of Review, Ohio Bureau of Employment Services dated October 15, 1976, and the decision of Referee of Board of Review, Ohio Bureau of Employment Services dated August 5, 1976.

STATEMENT OF JURISDICTION

Appellant Robert C. Sullivan, agent for Pipe Fitter claimants, appeals from the final order of the Supreme Court of Ohio dismissing his appeal entered June 11, 1980, motion for rehearing denied July 24, 1980. The notice of appeal to this Court was filed in the Supreme Court of Ohio on October 17, 1980. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial federal question is presented. Jurisdiction on this Court is conferred by 28 U.S.C. § 1257 (2).

After oral argument in the Ohio Supreme Court but before its decision in this case, the Supreme Court of Ohio decided another case, *In re Claim of King*, 62 Ohio St. 2d 87 (1980) in which it held for the first time that failure to serve a notice of appeal on the Administrator of the Bureau of Employment Services was a jurisdictional defect which

prevented the Court of Common Pleas and subsequent reviewing courts from acquiring subject matter jurisdiction. Upon release of the *King* decision, the employer-appellees filed a post-argument motion to dismiss the appeal for failure of the appellant to serve the Administrator. The appellees relied, in their motion to dismiss, on the fact that the certificate of service on the notice of appeal failed to indicate service on the Administrator. The appellant, in his memorandum in opposition, contended that despite the certificate of service, the Administrator was in fact served, and appellant offered in support an affidavit, postal receipts, and copies of correspondence indicating that counsel for the Administrator had actual notice of the appeal in the Court of Common Pleas.

Thus, a crucial question of fact was raised for the first time after the case had been submitted for decision on the merits to the Supreme Court of Ohio. In dismissing the appeal, the Supreme Court made no finding of fact regarding the question of actual notice. The Court merely granted the appellees' motion to dismiss which was based on the omission of the Administrator from the certificate of service on the notice of appeal. The Court held that *In re Claim King*, supra, was controlling. The *King* case, however, did not involve the question of actual service on the Administrator.

The failure of the Supreme Court of Ohio to discuss or even mention the factual question of actual service compels the conclusion that the statute, as applied by the Ohio Supreme Court, can be satisfied only by a representation by counsel in the certificate of service notwithstanding actual notice upon the Administrator. There is no rational basis for application of the statute in such a fashion. No state interests are served by such an interpretation. In applying the statute in such an arbitrary and irrational

fashion, appellant was denied his right to a fair decision on the merits of his appeal in violation of his right to due process and equal protection under the Fourteenth Amendment to the Constitution of the United States.

STATUTES INVOLVED

The pertinent statutes are:

Ohio Revised Code § 4141.01 (I) "Interested party" means the Administrator and any party to whom notice of a determination of an application for benefit rights or a claim for benefits is required to be given under § 4141.28 of the Revised Code.

Ohio Revised Code § 4141.28 (O) [Set forth in full in Appendix J].

STATEMENT OF THE CASE

This case involves the consolidated appeal from a series of administrative and judicial appellate decisions denying unemployment compensation benefits to employees represented by the appellant. (Appendices A-H).

By initial decisions issued in some 610 claims for unemployment compensation benefits, involving several different employers on various dates from July 9, 1974 through October 8, 1974, inclusive, the Administrator of the Ohio Bureau of Employment Services held that the employees in those cases became unemployed due to a "lack of work" and allowed unemployment compensation claims for all employees represented by certain building trades unions including the pipe fitters, laborers, carpenters, inside electricians, structural and reinforcing iron

workers, cement masons, operating engineers, painters and plumbers.

The employers appealed the allowance of all of these claims, and a hearing consolidating all claims and appeals was held by a Referee of the Board of Review, Ohio Bureau of Employment Services, in Cincinnati, Ohio on January 27, 1976.

As a result of the hearing, the Referee decided that the claimants represented by the pipe fitters and the laborers were disqualified from receiving benefits because their unemployment was due to a labor dispute other than a lockout. Accordingly the Referee reversed the allowance of the claims of the employees represented by the pipe fitters and laborers, but affirmed the allowance of all other claims. (Appendix H).

The Referee's decision was appealed by the pipe fitters and the laborers to the Board of Review. The Board affirmed the Referee in a two-to-one decision. (Appendix G). As to most pipe fitter claimants, the decisions of the Board of Review disallowing further appeal and denying benefits were consolidated in an appeal on behalf of the pipe fitter claimants through their agent, Robert C. Sullivan, Business Manager of Pipe Fitters Union Local No. 392, to the Court of Common Pleas for Hamilton County, Ohio pursuant to Ohio Revised Code § 4141.28 (O) in Case No. A7609115.

The Court of Common Pleas affirmed the decision of the Referee and the Board and entered final judgment denying benefits on November 16, 1977.

An appeal was taken to the Court of Appeals for the First Appellate District by the pipe fitter claimants in Case No. C77756. The Court of Appeals, in a two-to-one de-

cision, affirmed the decision of the Court of Common Pleas on June 20, 1979. (Appendix C).

Appellant appealed to the Supreme Court of Ohio on July 30, 1979. On September 27, 1979, the Ohio Supreme Court directed the Court of Appeals for the First Appellate District to certify the record. On March 19, 1980, the Supreme Court of Ohio heard oral arguments on the merits.

On April 16, 1980, the Supreme Court of Ohio decided the case of *In re Claim of King*, supra, which held that the failure to serve a copy of the notice of appeal to the Court of Common Pleas upon the Administrator of the Bureau of Employment Services prevented the Court of Common Pleas from acquiring jurisdiction of an appeal from the Board of Review to the Court of Common Pleas. Shortly thereafter, on or about May 8, 1980, defendants-appellees in this case filed a motion to dismiss for lack of subject matter jurisdiction on the basis of the decision in *In re Claim of King*.

On or about May 12, 1980, appellant filed his memorandum opposing the motion to dismiss. It was in his memorandum that appellant first had the opportunity to argue that the factual question of whether the Administrator was served with the notice of appeal for purposes of § 4141.28 (O) depends on whether there was actual service and not solely upon a mere representation in a certificate of service.

On or about May 15, 1980, the Administrator filed a memorandum supporting the motion to dismiss of the defendant-employers. Nowhere in his memorandum, however, did the Administrator deny the appellant's claim that he had in fact been served with the notice of appeal.

On June 11, 1980, the Supreme Court of Ohio granted

the motion to dismiss because "Appellant failed to file or serve a notice of appeal with the Administrator."

On or about June 18, 1980, appellant filed his motion for rehearing. In his motion, appellant strenuously argued that the Court's decision of June 11 was based upon an assumption of fact which was not supported by the record. Appellant contended that only the fact of service upon the persons designated can constitutionally be held to be jurisdictional, not the descriptions in a certificate of service where there is conflict or inconsistency between the two. Despite appellant's efforts, the Supreme Court of Ohio denied his motion for rehearing on July 24, 1980. (Appendix A).

Ironically, the Administrator and the Ohio Board of Review participated fully in the proceedings before the Ohio Supreme Court by filing briefs in opposition to appellant's motion to certify and in opposition to appellant's appeal on the merits, at no time raising any jurisdictional question until long after the case had been submitted for decision on the merits.

A SUBSTANTIAL FEDERAL QUESTION IS PRESENTED

The constitutional questions raised herein by appellant were raised in a timely fashion below. No jurisdictional questions were raised until after oral argument in the Supreme Court. Prior to the Court's decision in *In re Claim of King*, the Ohio Supreme Court had held that service of notice of appeal on the Administrator was not a jurisdictional prerequisite. *Joy Mfg. Co.* v. *Albaugh*, 159 Ohio St. 460 (1953). Appellant had, therefore, no reason to anticipate the constitutional question regarding

interpretation of the service of notice provisions in § 4141.-28 (O). Since the jurisdictional question did not arise until the post-argument stage, the constitutional questions raised by appellant for the first time in his post oral argument memoranda and motion for rehearing were timely. *Saunders* v. *Shaw,* 244 U.S. 217 (1917); *Missouri* v. *Gehner,* 281 U.S. 313 (1930).

At the time appellant filed his notice of appeal in the Court of Common Pleas, the procedural requirements of § 4141.28 (O) were not believed to be jurisdictional, *Joy Mfg. Co.* v. *Albaugh,* supra. To retroactively deny appellant his right to appeal by interpreting § 4141.28 (O) so as to impose jurisdictional requirements after appellant has diligently pursued his appeal through the oral argument stage before the Supreme Court of Ohio deprives appellant of due process of law in its primary sense of opportunity to be heard. See *Bouie* v. *Columbia,* 378 U.S. 347, 84 S.Ct. 1697 (1964).

The concepts of due process, equal protection, and basic fairness which have been held, over the years, to be cherished rights under the Fourteenth Amendment will be eroded if this Court should choose to permit the Supreme Court of Ohio to throw out the appeal of Robert C. Sullivan and the many persons he represents on the basis of its absurd application of § 4141.28 (O) to the effect that *actual* notice to the Administrator is irrelevant and that only a representation in a certificate of service that there has been service of notice will satisfy the procedural requirements of the statute.

CONCLUSION

The decision below dismissing the appeal for lack of subject matter jurisdiction should be summarily reversed and sent back to the Supreme Court of Ohio with a directive to afford appellant a hearing on whether the Administrator was in fact served with notice and, if he was so served, to proceed with a decision on the merits of the appeal. Alternately, this appeal should be accorded plenary review.

Respectfully submitted,

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APPENDIX A

THE SUPREME COURT OF THE STATE OF OHIO

1980 TERM

To wit: July 24, 1980

No. 79-1004

THE STATE OF OHIO,)
)
City of Columbus.)

Robert C. Sullivan,

Appellant,

vs.

Kaiser Engineers, Inc., et al.,

Appellees.

REHEARING

(Filed July 25, 1980)

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, of Clerk the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. .... Page ....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 24th day of July, 1980.

THOMAS L. STARTZMAN
Clerk.

By ..... Deputy

APPENDIX B-1

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1 - Supreme Court - File 2782

62 Ohio St. 2d] SULLIVAN v. ENGINEERS.
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SULLIVAN, AGENT, APPELLANT, v.
KAISER ENGINEERS, INC., ET AL., APPELLEES.

[Cite as Sullivan v. Kaiser Engrs., Inc. (1980),
62 Ohio St. 2d]

Unemployment compensation—Appeal from decision of Board of Review—Court of Common Pleas without subject-matter jurisdiction, when—Appeal dismissed.

(No. 79-1004—Decided June 11, 1980.)

APPEAL from the Court of Appeals for Hamilton County.

ON MOTION to dismiss.

In this cause, the Administrator of the Ohio Bureau of Employment Services approved the claims of 156 members of Cincinnati's Journeymen Pipe Fitters' Local Union No. 392 for unemployment compensation benefits. The appellees-employers, Kaiser Engineers, Inc., Oberle-Jordre Engineering & Erectors and Power Piping, Inc., appealed to the Board of Review of the Bureau of Employment Services. Upon the recommendation of a referee, the full board ordered that the claims be disallowed. Appellant, Robert C. Sullivan, business manager of Local No. 392 and claimants' agent, appealed the board's decision to the Court of Common Pleas of Hamilton County. The Court of Common Pleas affirmed the board's denial of the claims. Upon further appeal, the Court of Appeals affirmed that judgment.

The cause is now before this court pursuant to the allowance of a motion to certify the record. After argument in this court, appellees filed a motion to dismiss this appeal for lack of subject-matter jurisdiction.

Messrs. Brown, Korbee, Cummins & Brown and *Mr. Harold G. Korbee,* for appellant.

Messrs. Taft, Stettinius & Hollister, Mr. Lawrence G. Mackowiak and *Mr. J. Mack Swigert,* for appellees-employers.

Mr. William J. Brown, attorney general, and *Mr. Eugene P. Nevada,* for appellees Board of Review and Administrator, Bureau of Employment Services.

Per Curiam. Appellees base their motion upon the fact that appellant failed to file or serve a notice of appeal with the Administrator of the Ohio Bureau of Employment Services when the decision of the Board of Review was

appealed to the Court of Common Pleas. On authority of *In re Claim of King* (1980), 62 Ohio St. 2d 87, the Court of Common Pleas was without jurisdiction to hear the appeal, and appellees' motion to dismiss is therefore granted.

Appeal dismissed.

CELEBREZZE, C. J., HERBERT, W. BROWN, P. BROWN, SWEENEY, LOCHER and HOLMES, JJ., concur.

APPENDIX B-2

THE SUPREME COURT OF THE STATE OF OHIO

1980 TERM

To wit: June 11, 1980

No. 79-1004

THE STATE OF OHIO,)
)
City of Columbus.)

Robert C. Sullivan, Agent

Appellant,

vs.

Kaiser Engineers, Inc., et al.,

Appellees.

APPEAL FROM THE COURT OF APPEALS FOR HAMILTON COUNTY ON MOTION TO DISMISS

This cause, here on appeal from the Court of Appeals for Hamilton County, was heard in the manner prescribed by law. On consideration thereof, the motion to dismiss is hereby granted and appeal dismissed for the reasons set forth in the opinion rendered herein, and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein

It is further ordered that the appellee recover from the appellant its costs herein expended; and that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Hamilton County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of
the Court this ..... day of
..... 19....
..... Clerk
..... Deputy

APPENDIX C

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

No. C-77756

ROBERT C. SULLIVAN
Agent for All Pipe Fitter Claimants
Pipe Fitters' Union Local No. 392
1228 Central Parkway
Cincinnati, Ohio 45210,

Plaintiff-Appellant,

vs.

KAISER ENGINEERS, INC.
P.O. Box 201
Moscow, Ohio 45153

and

OBERLE-JORDRE ENGINEERING & ERECTORS
Tri-State Building, 432 Walnut Street
Cincinnati, Ohio 45202

and

POWER PIPING, INC.
829 Beaver Avenue
Pittsburgh, Pennsylvania 15223

and

BOARD OF REVIEW
Ohio Bureau of Employment Services
1916 Central Parkway
Cincinnati, Ohio 45214,

Defendants-Appellees.

DECISION

(Filed June 20, 1979)

Messrs. Brown, Korbee, Cummins & Brown, Harold G. Korbee of counsel, 6 East Fourth Street, Cincinnati, Ohio 45202, for Plaintiff-Appellant,

Messrs. Taft, Stettininus & Hollister, J. Mack Swigert and John E. Campion of counsel, 600 Dixie Terminal Building, Cincinnati, Ohio 45202, for Defendants-Appellees.

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and original papers from the Court of Common Pleas of Hamilton County, Ohio, the transcript of the proceedings, the assignments of error, the briefs and arguments of counsel.

The appellant, Robert C. Sullivan, acting as agent, filed unemployment compensation claims on behalf of some 156 members of Local 392 of the Pipe Fitters' Union (AFL-CIO). Each of these claims was approved after their initial submission to the Administrator of the Ohio Bureau of Employment Services. On appeal to the Board of Review by the appellees (employers of the claimants), a referee heard the evidence and recommended that the claims be denied. The full Board of Review accepted

the referee's findings and entered its order that the several claims be disallowed.

An appeal then was taken to the Court of Common Pleas of Hamilton County, which affirmed the Board and rendered final judgment without issuing a written opinion or otherwise detailing the grounds for its decision. The matter is now before this Court for a review of that final judgment.

I.

The facts which control, essentially, the disposition of this appeal are mostly undisputed by the several parties.

It appears from the record that the appellees are industrial construction and engineering firms which were engaged in the erection of two large power plants being built in Southwestern Ohio. Each firm employed union-affiliated pipe fitters on the two projects, hiring them exclusively through Local 392. The terms and conditions of their employment were spelled out in three separate labor agreements which were negotiated by the union's respective national, regional and local bargaining units.

The master contract in this three-tiered arrangement is the National Constructors Agreement. The parties to this contract include dominant nation-wide contracting firms, as well as the international AFL-CIO. Each of the appellees was a major signatory of this pact, whereas Local 392 was bound to its terms by virtue of its affiliation with the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry.

By express provision in the national contract, wage rates and other specified terms were to be established under separate bargaining agreements entered into at regional and local levels. Thus, the Cincinnati area Mechanical

Contractors Association and Local 392 arrived at their own accord which in turn governed a variety of matters left unresolved in the national agreement. None of the appellees are members of the Mechanical Contractors Association, and are only bound to the regional pact to the extent called for in the National Constructors Agreement.

The third contract is the so-called Project Agreement, entered into by the appellees and Local 392. Its provisions are confined to matters peculiar to the individual job site, and are otherwise immaterial in this appeal.

II.

During May of 1974, the regional contractors (the Mechanical Contractors Association) and Local 392 were deadlocked in their negotiations over a new collective bargaining agreement. Local 392 was threatening to strike if a satisfactory contract could not be signed prior to the expiration of the old agreement on June 1, 1974.

Although the appellees, as large national contractors, did not participate directly in these negotiations, they were nevertheless vitally interested in the outcome. Since the national agreement "pegged" wages at the rate set in regional labor pacts, the appellees gave their full support to the regional contractors' efforts to hold down an increase in pay and benefits for pipe fitters. When a strike appeared imminent, the appellees, acting in concert, sent word to the membership of Local 392 that they would "stop work" at the power projects to force a settlement. The appellees claimed then, as they do now on appeal, that the national agreement permitted them to stop work whenever a local union went on strike as the result of a local labor dispute.

Prior to announcing their strike on June 1st, the pipe

fitters sent a letter to each appellee, containing the following language:

> Local No. 392 has no intention of striking your Company and has no labor dispute with your Company.
>
> In the event you choose to stop work on June 1, 1974 as threatened and chose to lock out our members, kindly provide each employee with an appropriate layoff notice to expedite processing of unemployment compensation claims.

Once the strike began, Local 392 pipe fitters refused to work at construction sites involving members of the Mechanical Contractors Association, but workers attempted to report as usual to the appellees' power projects. Those employees were informed by management that all work had ceased, and that the appellees were closing down operations for the duration of Local 392's strike against the members of the Mechanical Contractors Association. Almost immediately, the union processed and filed the unemployment compensation claims which are the subject of the case *sub judice*.

III.

In two generalized assignments of error, the appellant argues that the unemployment compensation claims were wrongfully denied.[1] His predicate is that the appellees

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[1] The first assignment of error is:

> The Board of Review's determination that the work stoppage provisions of a nationally-negotiated collective bargaining agreement operated as an agreed bar to receipt of unemployment compensation benefits by individual employees is erroneous, un-

were not the object of Local 392's strike, since they were neither members of the Mechanical Contractors Association nor in any way directly involved in negotiations over the regional labor agreement. Consequently, appellant argues, the appellees' stop work order was nothing less than a precipitous lockout against employees who were ready, willing and able to work.

The appellees, on the other hand, contend that the provisions of the National Constructors Agreement entitled them to declare a cessation of work under the circumstances of this case. Article XX of that accord states in its entirety:

> **No Strike, No Lockout**
>
> During the life of this agreement, each of the signatory parites agrees that there will be no strikes, work stoppages, or lockouts by members of the Union or by the Employer. *In the event of an area strike over local contract negotiations, it will not be considered a violation of this agreement for the Employer to stop work covered by this agreement for the duration of the strike.* The Employer is required to give notification to the Union five (5) working days prior to taking such action.
>
> In the event of an area strike over local contract negotiations, it will not be considered a violation of

---

reasonable, against the manifest weight of the evidence and contrary to law.

The second assignment of error is:

> The Board of Review's determination that claimants' unemployment was due to a disqualifying labor dispute rather than lack of work or a lockout, is erroneous, unreasonable, against the manifest weight of the evidence and contrary to law.

this agreement for the Union to refuse to furnish men to the Employer for the duration of the strike. The Union is required to give notification to the Employer five (5) working days prior to taking such action.

This no strike, no lockout, commitment is based upon the agreement by both parties to be bound by the grievance and arbitration provisions of this agreement. The parties also agree that a breach of this no-strike no lockout provision shall constitute a breach of the entire agreement. [Emphasis added.]

From this the appellees reason that the pipe fitters are ineligible for benefits "because their collective bargaining agreement extended the labor dispute between the [union] and the area contractors to the premises of the [appellees]." It follows, they submit, that the workers' unemployment was due to a labor dispute over wages and benefits, not a lockout by management.

IV.

Our resolution of the issues raised in this case pivots on the question of whether or not the Ohio Unemployment Compensation Act, as amended, entitles these workers to benefits. The critical language appears in R.C. 4141.29 (D) (1) (a):

* * *

[N]o individual may . . . be paid benefits under the following conditions:

(1) For any week with respect to which the administrator finds that:

(a) His unemployment was due to a labor dispute

other than a lockout at any factory, establishment, or other premises located in this or any other state and owned or operated by the employer by which he is or was last employed . . . .

* * *

Broadly, this statute prohibits the payment of benefits to any worker whose unemployment is the result of a strike or other voluntary work stoppage initiated by the worker himself or his union. The policy underlying this rule recognizes the enormous advantage that organized labor would have over management if the state subsidized striking workers during the course of a labor dispute. A labor dispute culminating in a strike is essentially a clash of economic forces which tests the will and endurance of both sides to withstand severe financial displacement. Unemployment compensation policy is designed, therefore, to avoid creating an economic imbalance or stimulating labor strikes. Its purpose is to provide stability for workers who have lost their livelihood through no fault of their own. *See Leach* v. *Republic Steel Corp.* (1964), 176 Ohio St. 221, 210 N.E.2d 395. Accordingly, the disqualification provisions of R.C. 4141.29 (D) (1) (a) apply only to those workers whose unemployment was "caused by a labor dispute." *Baugh* v. *United Telephone Co.* (1978), 54 Ohio St. 2d 419, 422, 377 N.E.2d 766, 768.

In effectuating this policy, the Ohio statute uses language which is broader than that found in comparative legislation from other states.[2] Most importantly, there is

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[2] *I.e.*, Ky. Rev. Stat. § 341.360 (Supp. 1978):

> No worker may be paid benefits for any week of unemployment:
>
> (1) With respect to which a strike or other bona fide labor dispute which caused him to leave or lose his employment is in

no requirement within R.C. 4141.29 that the labor dispute be in active progress in the establishment at which the claimant was formerly employed. Moreover, the claimant need not be actually on strike, nor must it be shown that the employee or his employer is principally involved in the controversy which gave rise to the dispute. The sole requirement in Ohio is that the unemployment be caused by a bona fide labor dispute.

In the case *sub judice,* the appellees were faced with a situation[3] where a strike was being threatened over the breakdown of wage negotiations between their employees' labor union and a group of regional employers to which the appellees did not belong. Undeniably, the appellees shared a community of interest with members of the Mechanical Contractors Association because the National Constructors Agreement "pegged" wages to the outcome of regional collective bargaining. Thus, when Local 392

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active progress in the establishment in which he is or was employed except that benefits may be paid unless the employer notifies the division in writing within seven (7) days after the beginning of such alleged strike or labor dispute of the alleged existence of such strike or labor dispute. For the purpose of this subsection a lockout shall not be deemed to be a strike or a bona fide labor dispute and no worker shall be denied benefits by reason of a lockout . . . .

• • •

This statute was applied in a recent case decided in the Circuit Court of Franklin County, Kentucky, involving employees of the Oberle-Jordre Co., an appellee herein, arising under the same facts as the case *sub judice.* Based on the Kentucky statute, the court found that benefits should be paid to the claimants. *Oberle-Jordre Co., Inc.* v. *Kentucky Unemploy. Ins. Comm.,* No. 86170 (Franklin Cir. Ct., Feb. 3, 1977).

[3] Despite the diligent research conducted by this Court and counsel, no reported case has been found in any jurisdiction which presents the precise question at issue in this case.

struck, the appellees felt themselves compelled to issue a stop work directive in order to protect themselves from what threatened to be a protracted and one-sided strike.

In our view, the court below ruled properly in upholding the Board of Review's denial of these claims. The evidence within the record establishes beyond peradventure that Local 392 clearly foresaw that its strike would result in the shut down of both power plant sites. The appellees warned union officials that they would invoke Article XX of the national agreement, giving them the right to participate in local disputes by unilaterally stopping work. In view of their obvious appreciation of the foreseeable consequences of declaring a strike, the membership must be deemed to have chosen of their own volition to involve the appellees directly in their dispute with the regional employers. The determinative factor is not that the appellees declared a shut down, but rather that the union voted to take action for higher wages.[4] It follows, therefore, that the unemployment of these claimants was directly caused by the strike against the regional employees, coupled with its foreseeable effect upon the economic interests of the appellees.

V.

Accordingly, we affirm the decision of the court of common pleas upholding the denial of each claim for unemployment compensation by the appellant on behalf of individual members of Local 392.

KEEFE, P. J., and SHANNON, J., CONCUR.
PALMER, J., DISSENTS.

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[4] For a case involving an analogous fact situation and applying these general principles see *McKinley* v. *California Employ. Stabiliz. Comm'n* (1949), 34 Cal. 2d 239, 209 P.2d 602.

PALMER, J., DISSENTING

When the instant employees reported at their assigned time and place, announced themselves as ready, willing, and able to work, and were informed that they would not be permitted to do so because their employers had elected to stop work pursuant to Article XX of the National Constructors Agreement, there arose, in my judgment, a lockout within the meaning of R.C. 4141.29 (D) (1) (a).

> "A lockout has been defined as a cessation of the furnishing of work to employees or a withholding of work from them in an effort to get for the employer more desirable terms."

Zanesville Rapid Transit, Inc. v. *Bailey* (1958), 168 Ohio St. 351, 354, 155 N.E.2d 202, 205 (work stoppage determined on other grounds not to constitute a lockout). *See also Alden* v. *United States Industrial Chemicals Co.* (1966), 9 Ohio App. 2d 5, 222 N.E.2d 785; *Zura* v. *Marblehead Stone Division, Standard Slag Corp.* (1965), 13 Ohio Misc. 317, 224 N.E.2d 176 (Ottawa County C.P.).

It is perfectly true that the employers had the *contractual right* to stop work under Article XX of the Agreement, a right which insulated them from any civil liability for that act, and it is quite true, as the majority opinion notes, that legitimate tactical considerations may well have dictated the reactive course pursued by the employers in the then-existing dispute. It may even have been true that the employees foresaw or should have foreseen the employers' reaction; certainly they were warned to that effect, as the majority properly points out. But none of these facts should, in my judgment, determine the issue of entitlement to unemployment benefits under the Ohio act unless or until the General Assembly chooses to qualify

its present clear and unambiguous exemption of lockouts from the "labor dispute" disqualification provided in R.C. 4141.29 (D) (1) (a).

If it is rational to circumscribe the term "lockout" by excluding from its penumbra all instances of cessation of work permitted by a national agreement to which the employer and the national union are parties and/or all instances in which the cessation of work may be reasonably foreseen as a tactical consequence of a continuing labor dispute not directly involving the immediate parties, as is argued by appellees – and may, for all I know, be quite desirable in order to achieve some appropriate degree of economic parity between the contesting forces – I would prefer the circumscription to be undertaken by the Legislature rather than by the courts, since the matter seems to me peculiarly within the realm of public policy. I particularly feel this to be true where it is commanded that:

> "Section 4141.01 to 4141.16, inclusive, of the Revised Code shall be liberally construed."

R.C. 4141.46. Because I find the construction of R.C. 4141.29 (D) (1) (a) by the majority neither liberal nor necessary, I respectfully dissent.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

APPENDIX D

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

No. C-77756

ROBERT C. SULLIVAN,
Agent for All Pipe Fitter Claimants,
Pipe Fitters' Union Local No. 392
1228 Central Parkway
Cincinnati, Ohio 45210

Plaintiff-Appellant,

vs.

KAISER ENGINEERS, INC.
P.O. Box 201
Moscow, Ohio 45153

and

OBERLE-JORDRE ENGINEERING & ERECTORS
Tri-State Building, 432 Walnut Street
Cincinnati, Ohio 45202

and

POWER PIPING, INC.
829 Beaver Avenue
Pittsburgh, Pennsylvania 15223

and

BOARD OF REVIEW
Ohio Bureau of Employment Services
1916 Central Parkway
Cincinnati, Ohio 45214,

Defendants-Appellees.

JUDGMENT ENTRY

(Entered June 20, 1979)

This cause came on to be heard upon the appeal on questions of law, assignments of error, the record from the Court of Common Pleas of Hamilton County, Ohio, the briefs and the arguments of counsel.

Upon consideration thereof, the Court finds that the assignments of error are not well taken for the reasons set forth in the Decision filed herein, and made a part hereof.

It is, therefore, Ordered by the Court that the judgment of the Court of Common Pleas of Hamilton County, Ohio, be, and the same hereby is, affirmed.

It is further Ordered that a mandate be sent to the Court of Common Pleas of Hamilton County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with Rule 24, Appellate Rules.

And the Court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that a certified copy of this Judgment, with a copy of the Decision attached, shall constitute the mandate pursuant to Rule 27, Ohio Rules of Appellate Procedure.

To all of which the appellant, by his counsel, excepts.

APPENDIX E

COUNTY OF HAMILTON
COURT OF COMMON PLEAS
Cincinnati, Ohio 45202

August 25, 1977

Harold G. Korbee, Esq.
Attorney at Law
6 East 4th Street
Cincinnati, Ohio 45202

Re: Robert C. Sullivan, et al vs.
Kaiser Engineers, Inc. et al
Consolidated Cases Nos. A7609115,
A7609305 and A7609312

Dear Mr. Korbee:

I have reviewed the record in this case and more particularly I have reviewed the briefs filed by you, J. Mack Swigert and Gary L. Schneider and also subsequent correspondence. Although I will concede that you are correct in your letter of August 18, 1977 that you did not represent Ronald F. Bryant, the issues involved in and the law applicable to the Bryant case are exactly the same as those in these consolidated cases. Accordingly, this Court endorses entirely the decision of Judge Young in the case of *Ronald F. Bryant* vs. *Board of Review,* Case No. 39758, Court of Common Pleas, Warren County, Ohio. I agree that the Court of Common Pleas may not try the issue of fact in an appeal of this nature and that the court may not substitute its judgment for that of the Adminisrator or the Board of Review. As Judge Young has stated "under Section 4141.28 (ON) the Court of Com-

mon Pleas is limited to finding that 'the decision is unlawful, unreasonable or against the manifest weight of the evidence'. In that event it shall reverse and vacate such decision, enter a final judgment in accordance with such modification or otherwise it shall affirm the decision".

It is therefore the finding of this Court, similar to the finding of Judge Young, that the claim of the appellants should be disallowed and the decision below affirmed.

I am, therefore, ordering that Mr. Swigert shall prepare a judgment entry in accordance with this decision and reserve exceptions to the appellant.

Very sincerely yours,
/s/ Peter Outcalt, Judge

PO:nr

cc: J. Mack Swigert, Esq.
Gary L. Schneider, Esq.
Paul H. Tobias, Esq.

APPENDIX F

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. A-7609115

ROBERT C. SULLIVAN,
Agent for Pipefitter Claimants,
1228 Central Parkway
Cincinnati, Ohio 45210

Plaintiff-Appellant

v.

KAISER ENGINEERS, INC.
P. O. Box 201
Moscow, Ohio 45153

and

OBERLE-JORDRE ENGINEERING & ERECTORS
Tri-State Building
432 Walnut Street
Cincinnati, Ohio 45202

and

POWER PIPING, INC.,
829 Beaver Avenue
Pittsburgh, Pennsylvania 15223

Defendants-Appellees

JUDGMENT ENTRY

(Entered November 16, 1977)

This cause came on to be heard upon an appeal from the decision of the Board of Review, Bureau of Employment Services, State of Ohio. The Court, having reviewed the record of proceedings below and the arguments of counsel presented in written memoranda to the Court, and being fully advised in the premises, finds that such decision was not unlawful, unreasonable or contrary to the manifest weight of the evidence.

WHEREFORE, it is considered, adjudged and decreed that the decision of the Board of Review be, and the same is hereby affirmed.

Costs shall be paid by the Appellant.

To all of which the Appellant excepts.

/s/ PETER OUTCALT
Judge

Have seen:

/s/ J. MACK SWIGERT
Attorney for Appellees
Kaiser Engineers, Inc.
Oberle-Jordre Engineering & Erectors, Inc.
Power Piping, Inc.

/s/ GARY L. SCHNEIDER
Assistant Attorney General
For Appellee Board of Review

/s/ HAROLD G. KORBEE
For Appellant

APPENDIX G

BOARD OF REVIEW
Ohio Bureau of Employment Services
145 South Front Street P. O. Box 1618
Columbus, Ohio 43216

In re claim of:
PAUL E. ABBOTT, et al.
P. O. Box 353 - Route 1
Clay City, Kentucky 40312

S.S. No. 405-48-2118

Employer:
KAISER ENGINEERS, INC.
P.O. Box 2
Moscow, Ohio 45153

DECISION

On August 10, 1976, each of the claimants hereinafter listed filed a timely application to institute a further appeal before the Board of Review, pursuant to the provisions of Section 4141.28, Revised Code of Ohio, from the decision of the Referee, dated August 5, 1976.

Issue: Labor dispute.

Upon consideration thereof, and upon a review of the entire record, the Board concludes that said applications to institute a further appeal should be disallowed.

DECISION:

The application to institute a further appeal filed by each of the following claimants is hereby disallowed:

Appeals Docket No.	Name	Social Security No.
423777-M-BR	ABBOTT, Paul E.	405-48-2118
424951-M-BR	BAILEY, Kyle E.	413-66-2580
423791-M-BR	BAXTER, Kendall	268-40-3600
423792-M-BR	BAXTER, Oscar	555-26-7276
423793-M-BR	BEX, Frank D.	297-38-0392
423794-M-BR	BEX, Rufus, Jr.	548-58-2062
423803-M-BR	BICK, Joe R.	291-22-1667
423824-M-BR	BROBECK, Keneth W.	276-54-4362
423865-M-BR	BUCHERT, Donald C.	275-52-2318
423880-M-BR	CARROLL, Thomas J.	278-38-2298
423879-M-BR	CARROLL, Walter F.	270-03-5841
423886-M-BR	CHAMBLISS, Larry	299-48-5478
423887-M-BR	CHASTAIN, Charley W.	310-18-8393
423897-M-BR	COLINA, Edward R.	281-18-8626
423901-M-BR	COOK, Clyde	290-07-3110
423903-M-BR	COPAS, James H.	403-24-1026
423917-M-BR	CUNNINGHAM, Paul K.	270-44-2660
423926-M-BR	DAVIS, Troy	297-12-8452
423931-M-BR	DIERIG, Jerome A.	402-64-7237
423938-M-BR	DREIER, Harry F.	289-09-6862
423945-M-BR	FANNIN, Marcus	401-40-9293
423947-M-BR	FERGUSON, Robert F.	289-10-5179
423955-M-BR	FOX, James M.	298-28-9640
423959-M-BR	FROEHLE, Michael L.	300-46-3667
423987-M-BR	FULTON, Clifford S.	276-36-4746
423990-M-BR	GABRIEL, William F.	280-48-5282
423992-M-BR	GAINES, Arthur R.	403-40-8690
423993-M-BR	GEIGER, Douglas J.	272-50-7010
423996-M-BR	GERWIG, Verner	320-30-7563
424001-M-BR	GILB, Clifford J., Jr.	270-40-7658
424010-M-BR	GOODMAN, William H.	268-09-2311
424013-M-BR	GOULD, Harold L.	270-38-4423
424020-M-BR	HALL, Richard J.	285-32-8056
424021-M-BR	HALL, Robert J.	269-18-2403
424022-M-BR	HALL, William G.	268-40-5438
424024-M-BR	HAM, Walter	268-10-6563
424025-M-BR	HAMM, Walter, Jr.	285-32-4994
424035-M-BR	HARRIS, Jerry L.	406-64-8057
424028-M-BR	HARTKEMEYER, David E.	297-46-2683
424042-M-BR	HENRY, Dale E.	269-48-2414
424047-M-BR	HILES, Donald L.	285-32-5568

Appeals Docket No.	Name	Social Security No.
424048-M-BR	HILL, Edwin C.	405-24-5727
424050-M-BR	HOGUE, Robert N.	299-48-1412
424051-M-BR	HOLLERBACH, Harry M.	269-01-3900
424053-M-BR	HOLTZKAMP, William D.	291-22-0850
424053-M-BR	HUTZEL, Bernard F.	281-48-8228
424071-M-BR	JOHNSON, Clifford S.	295-36-6326
424108-M-BR	KELLY, Raymond, Jr.	299-44-9839
424113-M-BR	KIMBLE, George W.	272-32-7193
424115-M-BR	KIMMICK, Richard F.	287-12-7999
424116-M-BR	KIMMICK, Richard O.	278-46-7538
424135-M-BR	LETOURNEAU, Gerard F.	271-50-1139
424136-M-BR	LEWIS, Bill C.	234-07-8160
424139-M-BR	LINDON, Ralph G.	404-60-2167
424146-M-BR	LYONS, Willard F.	272-32-7602
424171-M-BR	MARSHALL, Clyde	713-18-7074
424172-M-BR	MARTIN, James J.	270-01-7208
424173-M-BR	MARTIN, William D., II	299-42-7269
424186-M-BR	MENNINGER, Edwin J.	269-10-9229
424196-M-BR	MENTZ, William A.	282-32-9461
424204-M-BR	NEELEY, Michael L.	283-34-6798
424327-M-BR	ROESSNER, Charles E.	301-28-1988
424346-M-BR	SHECKELS, Jeffrey C.	299-48-8597
424962-M-BR	SPIVEY, Ronald	299-48-6929
424979-M-BR	STEWART, James R.	297-38-1565
424982-M-BR	SULLIVAN, Thomas G.	272-50-5476
424994-M-BR	TYNER, James B.	298-34-3347
424999-M-BR	WALCOTT, Jack A.	440-10-7743
425144-M-BR	WIECZORKOWSKI, Joseph A.	271-42-6616
425165-M-BR	YOUNG, Michael O.	299-52-1914
425166-M-BR	YUMBAR, Steven G.	294-50-5043

BOARD OF REVIEW

/s/ WILLIAM D. CAMPBELL
Chairman

/s/ JOHN E. JONES,
Member

Date of Mailing: October 15, 1976

Francis M. Brockmeyer, Member, dissents.

L. O. 156-1

An appeal from this decision may be filed in a Court of Common Pleas within thirty (30) days from the date of mailing, in the manner set forth in Section 4141.28 (O), Revised Code of Ohio.

APPENDIX H

BOARD OF REVIEW
Ohio Bureau of Employment Services
145 South Front Street P. O. Box 1618
Columbus, Ohio 43216

In re claim of:	**Employer:**
NORMAN R. AGNEW, et al	KAISER ENGINEERS, INC.
226 W. 15th Street	P.O. Box 201
Covington, Kentucky 41014	Moscow, Ohio 45153
S.S. No. 289-05-0322	UCO Account No. 265963

DECISION

By an initial decision issued in 483 cases on various dates from July 9, 1974 through October 8, 1974 inclusive the Administrator held that the claimant became unemployed at Kaiser Engineers, Inc., due to a lack of work and allowed

claim which was for the week ending June 8, June 15, June 22, June 29, July 6, July 13, July 20, July 27, August 3, August 10, and August 17, 1974.

On various dates from July 15, 1974 through October 14, 1974 inclusive Kaiser Engineers, Inc., filed a timely request for reconsideration. The Administrator referred the request for reconsideration to the Board of Review as appeals which the Board directed be consolidated for the purposes of hearing.

Hearing date: January 27, 1976

Place: Cincinnati, Ohio.

All interested parties were duly notified of the date, time and place of hearing.

Appearances: Claimants appeared through and were represented by Harold G. Korbee, Attorney, Theodore M. Berry, Attorney, Thomas J. Kircher, Attorney, Charles E. Clendennin, Attorney, Thomas F. Phalen, Jr., Attorney, William F. Leese, Attorney, James Harlow, Greater Cincinnati Bldg. Trades Council, and Tom Wilson.

Kaiser Engineers, Inc., was represented by J. Mack Swigert, Attorney, William K. Engeman, Attorney, L. A. Obenshain, Attorney, and Lawrence J. Barty, Attorney.

FINDINGS OF FACT:

Each of the claimants filed a claim for unemployment compensation with respect to one of the weeks ending June 8, 15, 22, 29, July 6, 13, 20, 27, August 3, 10, and 17, 1974. Prior to the date of filing said claims each of the claimants was a member of one of the bargaining units represented

by the Pipefitters, Laborers, Carpenters, Inside Electricians, Structural and Reinforcing Ironworkers, Cement Masons, Operating Engineers, Painters or Plumbers, encompassing virtually all of the construction unions in the Cincinnati area, and was employed by Kaiser Engineers, Inc., herein after referred to as "Kaiser".

Kaiser was engaged in construction of the William H. Zimmer Nuclear Power Station in Moscow, Ohio, (hereinafter referred to as "Zimmer".) Kaiser had recognized the respective labor organizations of the Cincinnati Building Trades Council as collective bargaining representative.

Pipefitters Local #392 and Laborers Local #265 among others in the construction trade had each furnished several hundred skilled workers at the Zimmer work site pursuant to a National agreement between Kaiser and the National or International Association of the local unions. Wage rates at Zimmer were pegged to the rates established by negotiations between the local unions and the local area contractors group or association. Kaiser was not a member of the local area contractors association. Both National agreements between Kaiser and the Pipefitters Union and between Kaiser and the Laborers Union contained "no strike," "no lockout," clauses, and authorized Kaiser to stop work and the unions respectively to stop furnishing men in the event of a local strike between local unions and local area contractors associations for the duration of any local strike upon the giving of five days' advance notice thereof. Both the Pipefitters and Local Laborers local agreements with the respective local contractors associations were due to expire on May 31, 1974. Both unions were notified by Kaiser prior thereto that in the event of a local strike the work would stop at the "Zimmer" worksite. Both locals of the Pipefitters and Laborers Unions

struck their respective local contractors associations and work was stopped by Kaiser at the Zimmer worksite.

Stoppage of work for the Pipefitters and Laborers, two of the largest crafts, might have ultimately resulted in the stoppage of work for the remaining crafts because of their interdependence of each other in construction work. The record is devoid however of probative evidence on this point and the simultaneous stoppage of work for all crafts at Zimmer by Kaiser obviates the necessity of a finding thereon.

All employees affected by the stoppage of work on June 1, 1974 were given "layoff slips" by Kaiser indicating termination for "lack of work" or "reduction in force". Representatives of the various crafts notified Kaiser in writing that the strike involving local issues such as wage rates, etc. was not against Kaiser but only against those employers who were members of the respective local contractors associations and who are not parties to this proceeding. At no time was there any strike activity nor were any picket lines established by any of the crafts at the Zimmer work site over the general unemployment period from June 1, 1974 through August 17, 1974.

The Laborers local strike against their local contractors association actually lasted from June 1, 1974 to June 17, 1974 and the Pipefitters strike against their local contractors association lasted from June 1, 1974 to July 8, 1974. During this period some Laborers and some Pipefitters were recalled by Kaiser as their respective services were needed by this employer.

REASON:

Issue: Unemployment due to a labor dispute — other than a lockout * * *.

Section 4141.29 (D) (1) (a), Revised Code of Ohio provides as follows:

> "(D) Not withstanding division (A) of this section, no individuals may serve a waiting period or be paid benefits under the following conditions:
>
> "(1) For any week with respect to which the administrator finds that:
>
> "(a) His unemployment was due to a labor dispute other than a lockout at any factory; establishment, or other premises located in this or any other state and owned or operated by the employer by which he is or was last employed; and for so long as his unemployment is due to such labor dispute. * * *."

It is the contention of the appellant that the claimants who were unemployed over the period from June 1, 1974 through August 17, 1974 were unemployed due to a labor dispute. It is the contention of the claimants that there was no labor dispute between them and Kaiser; that the only labor dispute and strike that existed was that between the Pipefitters and their local contractors association and between the Laborers and their local contractors association. Since Kaiser was not a member of either of the local contractors associations involved in the strike, it is further contended by the claimants that the unemployment that occurred during the period in question was the result of a "lockout" when work was stopped by Kaiser pursuant to the terms of the National and Project agreements.

The Ohio Supreme Court in the case of Leach vs. Republic Steel Corporation, 27 O.O. (2d) 122; 176 O.S. 221 defines a strike and labor dispute as follows:

> "As generally understood a 'strike' is a cessation of work by employees in an effort to obtain more de-

> sirable terms with respect to wages, working conditions, etc., whereas a 'labor dispute' is of broader scope and includes a controversy between employer and employee concerning wages, working conditions or terms of employment."

A "lockout" has been defined as: "* * * a cessation of the furnishing of work to employees in an effort to get for the employer more desirable terms". "* * * there is inherent in all these definitions the idea of unilateral action * * *". "* * * positive action by the employees in the case of a strike and positive action by the employers in the case of a lockout." U.S. Coal Company vs. Board of Review, 16 O.O. 323, App. p.p. 328, 329.

Unemployment due to a labor dispute occurred on June 1, 1974 when Kaiser exercising its option under the National agreements with the Laborers and Pipefitters stopped all work at the "Zimmer" worksite simultaneously with the same unions going out on strike against their respective local contractors associations. The provisions of the National agreements which pegged wages, hours and working conditions at "Zimmer" to whatever was agreed to between the unions and the local contractors associations extended the ambits of the "controversy" between these crafts and their local contractors associations to "Zimmer" upon the exercise of said options.

The stoppage of work by "Kaiser" was not a lockout of the Laborers and Pipefitters. Under the terms of the National agreements between the immediate parties as the work stoppage was agreed to and authorized. It was not therefore a "unilateral action." Claimant, Laborers and Pipefitters out of work during the general unemployment period from June 1, 1974 to August 17, 1974 were unemployed due to a labor dispute and weekly claims for bene-

fits of these two crafts falling within said period will be disallowed.

The simultaneous stoppage of work by Kaiser on June 1, 1974 of all other crafts not being authorized or agreed to by the respective parties was the direct and immediate cause of their unemployment constituting a "unilateral" withholding of work from said claimants by Kaiser and therefore a "lockout" within the purview of Section 4141.29 (D) (1) (a), Revised Code of Ohio.

All other claimants therefore except the Laborers and Pipefitters were therefore unemployed during the weeks in issue due to a lockout. Weekly claims for benefits falling within the general unemployment period from June 1, 1974 through August 17, 1974 of all other crafts, except the Laborers and Pipefitters, if otherwise eligible, will be allowed.

DECISION:

The Administrator's initial decision in 275 number of cases are hereby affirmed with the exception that it is held that claimant's unemployment was due to a lockout at "Zimmer" and not a lack of work. Claim for the weeks hereinafter set forth if otherwise eligible is hereby allowed.

Appeals Docket No.	Name	Social Security No.	Week In Issue
423776-M	Norman R. Agnew	289-05-0322	6/22/74
423778-M	Ervin E. Adams	290-24-1077	6/08/74
423779-M	James O. Adkins	272-32-1382	6/08/74
423780-M	Ronald S. Adkins	362-54-9360	6/08/74
423781-M	Fred L. Alread	418-60-9493	6/08/74
423782-M	Marion Amos	407-24-3043	6/08/74
423786-M	Lawrence G. Anter	297-44-7712	6/08/74
423788-M	Walter Arrowood	405-40-4947	6/22/74
423789-M	Reece Barger	415-34-7920	6/08/74

Appeals Docket No.	Name	Social Security No.	Week In Issue
423795-M	Hayward Beach	293-40-8291	6/08/74
423797-M	Glenn Beckett	289-03-5227	6/29/74
423798-M	Glenn W. Beckett	270-38-4831	7/13/74
423799-M	Ernest D. Beckner	236-62-0278	6/08/74
423802-M	Robert J. Berg	273-24-4054	6/08/74
423805-M	James E. Birkla	405-20-6069	6/08/74
423806-M	Ivan Bishop	270-38-2528	6/08/74
424995-M	Valentine H. Wocher	281-28-1580	6/08/74
425158-M	Jack Wolfson	291-22-1869	6/08/74
425159-M	Kenneth H. Woodmansee	295-30-8736	6/08/74
425160-M	Kenneth H. Woodmansee	295-30-8736	8/03/74
425161-M	Charles L. Workman	272-32-8268	6/08/74
425162-M	James L. Workman	400-20-0342	8/03/74
425163-M	Fred Wright	268-28-3203	7/20/74

The Administrator's initial decision in 208 number of cases are hereby reversed on the grounds that the claimants' unemployment at "Zimmer" was due to a labor dispute and claim for the week hereinafter set forth is disallowed.

Appeals Docket No.	Name	Social Security No.	Week In Issue
423777-M	Paul E. Abbott	405-48-2118	6/08/74
423783-M	Edward L. Anderson	300-46-2578	6/22/74
423784-M	Joe Anderson	421-07-7082	6/22/74
423785-M	Jordan Anderson	422-01-9494	6/22/74
423787-M	John H. Anthony	260-42-5228	6/29/74
424951-M	Kyle E. Bailey	413-66-2580	8/10/74
423790-M	Randall C. Bastin	280-46-6472	6/22/74
423791-M	Kendall Baxter	268-40-3600	6/08/74
423792-M	Oscar Baxter	555-26-7376	6/08/74
423796-M	Robert W. Beck	041-30-5961	6/22/74
423800-M	Mack Bennett	265-32-7825	6/29/74
423801-M	George W. Benyon	271-18-3614	6/22/74
423793-M	Frank D. Bex	297-38-0392	6/08/74
424998-M	Freddie Walker	424-16-1388	6/22/74
425131-M	Eddie Watson	302-03-2571	6/22/74

Appeals Docket No.	Name	Social Security No.	Week In Issue
425132-M	Gerald V. Watters	268-28-1158	7/13/74
425133-M	James M. Watts	416-64-7417	6/29/74
425140-M	Jack White	278-28-5019	6/29/74
425141-M	John H. White	409-24-4372	6/22/74
425142-M	Samuel Whitfield	373-30-6073	6/22/74
425144-M	Joseph A. Wieczorkowski	271-42-6616	7/27/74
425150-M	Barry R. Williams	283-50-5717	6/22/74
425151-M	Cecil Williams, Jr.	402-48-1262	6/22/74
425152-M	Leon Williams	270-12-1706	6/22/74
425153-M	Perry Williams	420-16-3974	7/13/74
425164-M	Frank C. Yeager	286-20-0432	8/03/74
425165-M	Michael O. Young	299-52-1914	6/22/74
425166-M	Steven G. Yumbar	294-50-5043	6/08/74

/s/ RAYMOND L. HIRSCH,
Referee

Date of Mailing: August 5, 1976
8 & 11
L.O. 156-1

An application to institute further appeal before the Board of Review may be filed by any interested party within fourteen (14) days after the date of mailing of this decision.

Claimants are advised that if this decision becomes final because no timely application to institute a further appeal is filed, an overpayment of benefits already received may exist, and an order of repayment may be issued by the Administrator of the Bureau of Employment Services.

APPENDIX I

IN THE SUPREME COURT OF OHIO
CASE NO. 79-1004

ROBERT C. SULLVAN,
Agent for Pipe Fitter Claimants,
Plaintiff-Appellant,

vs.

KAISER ENGINEERS, INC., et al.
Defendants-Appellees.

On Appeal From
The First Appellate District
Hamilton County, Ohio
(Filed October 17, 1980)

PLAINTIFF-APPELLANT'S NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT

WILLIAM J. BROWN
Attorney General

Eugene P. Nevada
Assistant Attorney General
145 South Front Street
Columbus, Ohio 43215
(614) 466-2707

Counsel for Administrator,
Ohio Bureau of Employment Services and Board of Review

Harold G. Korbee
Korbee & Korbee
817 Fourth & Race Tower
105 West Fourth Street
Cincinnati, Ohio 45202

Counsel for Appellant

J. Mack Swigert
600 Dixie Terminal
Building
Cincinnati, Ohio 45202
(513) 381-2838

Counsel for Employer-
Appellees

NOTICE OF APPEAL

Notice is hereby given that Robert C. Sullivan, agent for Pipe Fitter claimants, plaintiff-appellant, hereby appeals to the United States Supreme Court from the final judgment of the Supreme Court of Ohio dismissing his appeal entered June 11, 1980, rehearing denied July 24, 1980. Appeal to the United States Supreme Court is taken under 28 U.S.C. Section 1257 (2).

/s/ HAROLD G. KORBEE,
Attorney for Plaintiff-
Appellant

Korbee & Korbee
817 Fourth & Race Tower
105 West Fourth Street
Cincinnati, Ohio 45202
(513) 621-1500

PROOF OF SERVICE

STATE OF OHIO

ss.

HAMILTON COUNTY

HAROLD G. KORBEE, being first duly sworn, states that a copy of the foregoing Notice of Appeal was served by certified U.S. mail, postage prepaid, on October 17, 1980, upon the following parties:

1. J. Mack Swigert
   600 Dixie Terminal Building
   Cincinnati, Ohio 45202
   (513) 381-2838
   Counsel for Employer-Appellees.

2. William J. Brown,
   Attorney General of the State of Ohio

   Eugene P. Nevada
   Assistant Attorney General
   145 South Front Street
   Columbus, Ohio 43215
   (614) 466-2707
   Counsel for Administrator, Ohio Bureau of Employment Services and Board of Review, Appellees

/s/ HAROLD G. KORBEE,

Attorney for Plaintiff-Appellant

817 Fourth & Race Tower
105 West Fourth Street
Cincinnati, Ohio 45202
(513) 621-1500

Sworn to and subscribed before me this 17th day of October, 1980.

/s/ THOMAS C KORBEE
Notary Public

THOMAS C. KORBEE, Attorney at Law NOTARY PUBLIC. My Commission has no expiration date. Section 147.03 O.R.C.

APPENDIX J

OHIO REVISED CODE STATUTE

§ 4141.28 **Claim for benefits; procedure.**

. . . . .

(O) Any interested party may, within thirty days after notice of the decision of the board was mailed to the last known post office address of all interested parties, appeal from the decision of the board to the court of common pleas of the county wherein the appellant, if an employee, is resident or was last employed or of the county wherein the appellant, if an employer, is resident or has his principal place of business in this state. Such appeal shall be taken within such thirty days by the appellant by filing a notice of appeal with the clerk of the court of common pleas, with the board, and upon all appellees by registered mail to their last known post office address. Such notice of appeal

shall set forth the decision appealed from and the errors therein complained of. Proof of the filing of such notice with the board shall be filed with the clerk. All other interested parties before the board or the referee shall be made appellees. The board upon writtn demand filed by an appellant shall within thirty days after the filing of such demand file with the clerk a certified transcript of the record of the proceedings before the board pertaining to the decision complained of, and the appeal shall be heard upon such record certified by the board. A bill of exceptions shall not be required. After an appeal has been filed in the court, the board may, by petition, be made a party to such appeal. If the court finds that the decision was unlawful, unreasonable, or against the manifest weight of the evidence, it shall reverse and vacate such decision or it may modify such decision and enter final judgment in accordance with such modification; otherwise such court shall affirm such decision. Any interested party shall have the right to appeal from the decision of the court as in civil cases, provided a bill of exceptions shall not be required at any level of appeal.

Supreme Court, U. S.
FILED
JAN 14 1980
MICHAEL RODAK, JR., CLERK

No. 80-662

In the Supreme Court of the United States

October Term, 1980

ROBERT C. SULLIVAN, Agent for Pipe Fitter Claimants,
Plaintiff-Appellant,

vs.

KAISER ENGINEERS, INC., and OBERLE-JORDRE ENGINEERING AND ERECTORS, and POWER PIPING, INC., and BOARD OF REVIEW, OHIO BUREAU OF EMPLOYMENT SERVICES, and ALBERT G. GILES, Administrator, Ohio Bureau of Employment Services,
Defendants-Appellees.

ON APPEAL FROM THE SUPREME COURT OF OHIO

MOTION TO DISMISS OR AFFIRM

J. MACK SWIGERT
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(513) 381-2838
Attorney for Defendants-Appellees

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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No. 80-662

In the Supreme Court of the United States

October Term, 1980

ROBERT C. SULLIVAN, Agent for Pipe Fitter Claimants,
Plaintiff-Appellant,

vs.

KAISER ENGINEERS, INC., and OBERLE-JORDRE ENGINEERING AND ERECTORS, and POWER PIPING, INC., and BOARD OF REVIEW, OHIO BUREAU OF EMPLOYMENT SERVICES, and ALBERT G. GILES, Administrator, Ohio Bureau of Employment Services,
Defendants-Appellees.

ON APPEAL FROM THE SUPREME COURT OF OHIO

MOTION TO DISMISS OR AFFIRM

The Appellees, Kaiser Engineers, Inc., Oberle-Jordre Engineering and Erectors, and Power Piping, Inc., move the Court to dismiss the appeal herein or, in the alternative, to affirm the decision of the Supreme Court of Ohio which granted the motion of the Appellees to dismiss the appeal filed with that court by the Appellant, on the ground that the appeal herein presents no substantial federal question and that no further argument is required.

I

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. The Statute.

This appeal involves the construction and application by the Supreme Court of Ohio of certain provisions of Ohio unemployment compensation legislation, to-wit, Title 41, Ohio Revised Code §§ 4141.01(I) and 4141.28(O). Section 4141.01(I) states:

> "'Interested party' means the administrator and any party to whom notice of a determination of an application for benefit rights or a claim for benefits is required to be given under section 4141.28 of the Revised Code."

Section 4141.28(O), in relevant part, states:

> "Any interested party may, within thirty days after notice of the decision of the board was mailed to the last known post office address of all interested parties, appeal from the decision of the board to the court of common pleas of the county wherein the appellant, if an employee, is resident or was last employed or of the county wherein the appellant, if an employer, is resident or has his principal place of business in this state. Such appeal shall be taken within such thirty days by the appellant by filing a notice of appeal with the clerk of the court of common pleas, with the board, and upon all appellees by registered mail to their last known post office address. Such notice of appeal shall set forth the decision appealed from and the errors therein complained of. Proof of the filing of such notice with the board shall be filed with the clerk. All other

interested parties before the board or the referee shall be made appellees. * * * After an appeal has been filed in the court, the board may, by petition, be made a party to such appeal. If the court finds that the decision was unlawful, unreasonable, or against the manifest weight of the evidence, it shall reverse and vacate such decision or it may modify such decision and enter final judgment in accordance with such modification; otherwise such court shall affirm such decision. Any interested party shall have the right to appeal from the decision of the court as in civil cases, provided a bill of exceptions shall not be required at any level of appeal."

In *Re Claim of King* (April 16, 1980) 62 O.S. 2d 87, 403 N.E. 2d 200, the Supreme Court of Ohio, construing the above-quoted sections of the Act, held that the Administrator of the Ohio Bureau of Employment Services is an "interested party" in all appeals to the Court of Common Pleas from a decision of the Board of Review of the Bureau of Employment Services and that whenever an appeal is undertaken without the Administrator being made a party thereto, the Court of Common Pleas lacks "subject matter jurisdiction."

B. The Proceedings Below.

By initial decisions issued in some 610 claims for unemployment compensation benefits, involving several different employers on various dates from July 9, 1974 through October 8, 1974, inclusive, the Administrator of the Ohio Bureau of Employment Services held that the employees in those cases became unemployed due to a "lack of work" and allowed unemployment compensation claims for all employees represented by certain building trades unions, including the Pipe Fitters, Laborers, Car-

penters, Inside Electricians, Structural and Reinforcing Iron Workers, Cement Masons, Operating Engineers, Painters and Plumbers.

The employers appealed the allowance of all of these claims, and a hearing consolidating all claims and appeals was held by a Referee of the Board of Review, Ohio Bureau of Employment Services, in Cincinnati, Ohio on January 27, 1976.

As a result of the hearing, the Referee decided that the claimants represented by the Pipe Fitters and the Laborers were disqualified from receiving benefits because their unemployment was due to a labor dispute other than a lockout. Accordingly, the Referee reversed the allowance of the claims of the employees represented by the Pipe Fitters and Laborers, but affirmed the allowance of all other claims. (See Appendix H to Jurisdictional Statement filed herein by Appellant.)

The Referee's decision was appealed by the Pipe Fitters and the Laborers to the Board of Review. On October 15, 1976, the Board affirmed the decision of the Referee, holding that the Pipe Fitters and Laborers were disqualified from receiving benefits.

On November 5, 1976, the Appellant filed with the Court of Common Pleas of Hamilton County, Ohio, in Case No. A7609115, a purported "NOTICE OF APPEAL FROM DECISIONS OF BOARD OF REVIEW, OHIO BUREAU OF EMPLOYMENT SERVICES", a copy of which is annexed hereto as Appendix 1. In this Notice of Appeal, the named Appellees were Kaiser Engineers, Inc., Oberle-Jordre Engineering and Erectors, and Power Piping, Inc. Neither the Board of Review, Ohio Bureau of Employment Services, nor the Administrator of the Ohio Bureau of Employment Services was named as an Appellee.

Subsequent to the filing of the above "NOTICE OF APPEAL", and after the thirty-day period prescribed in R.C. 4141.28(O) for the filing of a Notice of Appeal had expired, the Appellant, on or about January 24, 1977 filed in the Common Pleas Court a "MOTION-PETITION OF PLAINTIFF TO ADD NEW PARTY DEFENDANT", in which leave was sought to make "the Board of Review, Ohio Bureau of Employment Services, 145 South Front Street, P.O. Box 1618, Columbus, Ohio 43216, an additional party defendant in this appeal action." (Appendix 2) On February 3, 1977, this motion was granted. (Appendix 3)

The Court of Common Pleas affirmed the decision of the Referee and the Board and entered final judgment, denying benefits on November 16, 1977.

An appeal was taken to the Court of Appeals for the First Appellate District by the Pipe Fitter claimants in Case No. C77756. The Court of Appeals affirmed the decision of the Court of Common Pleas on June 30, 1979. (See Appendix C to Appellant's Jurisdictional Statement) An appeal was then taken by the Appellant to the Supreme Court of Ohio on July 30, 1979. A motion to certify the record was granted and on March 19, 1980, the Supreme Court of Ohio heard oral arguments on the merits.

On April 16, 1980, and while the above case was awaiting decision, the Supreme Court of Ohio decided the case of *Re Claim of King, supra,* which held that in such a case, the Common Pleas Court lacked subject matter jurisdiction whenever, as in the instant case, the Administrator of the Ohio Bureau of Employment Services was not made a party to the appeal and proceeding.

Following publication of the Court's decision in *Re Claim of King*, the Appellees filed a motion in the Supreme Court of Ohio, directing its attention to the lack of subject matter jurisdiction in the instant case and seeking dismissal of the appeal. After further briefing by the parties, in which the Administrator of the Bureau of Employment Services supported the motion to dismiss filed by the Appellees, the Supreme Court, on June 11, 1980, granted the Appellees' motion to dismiss the appeal. On June 18, 1980, the Appellant moved for a rehearing, claiming that the Administrator had, in fact, been served with notice of the pendency of the appeal in the Common Pleas Court. There was no contention, however, that the Administrator had ever been named as a party-appellee in the Notice of Appeal or had been added as a party-appellee within the thirty-day period prescribed by 4141.28(O), or at any time thereafter. On July 24, 1980, the Supreme Court of Ohio denied the motion for rehearing.

II

ARGUMENT

The Case Presents No Substantial Federal Question.

The law to be applied in determining whether the Appellant duly perfected his appeal from the Board of Review to the Common Pleas Court of Hamilton County, Ohio, is the law of Ohio. Construction of the law of Ohio is the exclusive prerogative of the Supreme Court of Ohio. In *Erie v. Tompkins* (1938) 304 U.S. 64, this Court said:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern." (At 78)

The Court further said, quoting from its earlier decision in *B&O Railroad Co. v. Baugh* (1893) 149 U.S. 368, at 401, that:

> " 'Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specially authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence.' " (At 79)

The Appellant's right to appeal to the Common Pleas Court was a statutory right conferred by Revised Code 4141.28(O) and 4141.01(I). The Legislature which conferred the right of appeal had the right to establish the

conditions for the exercise of that right. One of the conditions was that the right must be exercised "within thirty days after notice of the decision of the board was mailed." Another condition was that all "interested parties before the board or the referee shall be made appellees." In 4141.01(I), the Legislature stated:

> " 'Interested party' means the *administrator* and any party to whom notice of a determination of an application for benefit rights or a claim for benefits is required to be given under section 4141.28 of the Revised Code." (Emphasis added)

In the instant case, the Appellant failed to comply with the explicit requirement of the statute that the Administrator "shall be made" an appellee. The only appellees named by him within the thirty-day period were the three employers who have filed the instant motion. The Supreme Court of Ohio, exercising its constitutional jurisdiction, has declared that whenever an appellant violates the requirement that the Administrator be made a party, the Common Pleas Court lacks "subject matter jurisdiction" and that in such case, the purported appeal must be dismissed. *Re Claim of King, supra,* at 201; Opinion in instant case, Jurisdictional Statement, Appendix B-1 (pages 2a-4a).

The defect of subject matter jurisdiction is one which can be raised at any stage of a legal proceeding. *Federal Rules of Civil Procedure,* Rule 12(h)(3); *Ohio Rules of Court,* Rule 12(H)(2); *Louisville & Nashville Railroad v. Mottley* (1908) 211 U.S. 149.

The incurable jurisdictional defect in the instant case is *not* that the Administrator lacked *notice* of the existence of the appeal. The defect is that he was never made a *party* to the Common Pleas case. As indicated

above, to become a party, he would have had to be named as a party in a notice of appeal filed within the thirty-day period specified in the statute. He was never so named. The practical importance of compliance is illustrated by the fact that, absent compliance, the Administrator would not have had the right to appeal from an adverse decision of the Common Pleas Court if an adverse decision had been rendered by that court. Section 4141.28(O) asserts, "Any interested *party* shall have the right to appeal from the decision of the court as in civil cases * * *" There is no provision for appeals by a non-party, such as the Administrator here. Surely the Ohio Supreme Court had a Constitutional right to conclude that the Common Pleas Court would have no jurisdiction to decide an appeal when a necessary party was not timely listed in the Notice of Appeal and thus had not properly been brought before the Court.[1]

Bouie v. Columbia (1964) 378 U.S. 347, relied on by the Appellant, is inapplicable for several reasons:

(a) In *Bouie*, the state statute was phrased in narrow terms and specifically prohibited only "*entry* upon the lands of another * * * after notice from the owner or tenant prohibiting such entry * * *". (At 349; emphasis added) The appellant had been permitted by the owner to enter the premises and only at some later time was asked by the owner to leave. When he refused to do so, he was convicted for violation of the criminal statute. The conviction was then approved by the state Supreme Court which expanded the statute by construction to include refusals to leave as well as entry after notice prohibiting entry. In reversing, this Court noted that "a statute precise on

---

1. As indicated above, even the Bureau was not named as a party until after expiration of the thirty-day period.

its face has been unforeseeably and retroactively expanded by judicial construction" (at 352) and stated:

> "When a statute on its face is narrow and precise, however, it lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction." (At 352)

The Court also noted that in earlier decisions, such as that in *State v. Green* (1892) 35 S.C. 266, the state court had limited the statute to "entry" situations. (At 356) In the instant case, a statute narrowly worded, which by its terms requires "the administrator" to be made an "appellee" (R.C. 4141.01(I) and 4141.28(O)) has been given a narrow—not a broad—construction by the state Supreme Court, precisely reflecting the narrowly expressed intention of the state legislature. (*Re Claim of King, supra,* at 201-202) Also, it should be noted that the earlier decision of the Supreme Court of Ohio relied on by the Appellant (*Joy Mfg. Co. v. Albaugh* (1953) 159 O.S. 460) involved statutory provisions different from those construed in *Re Claim of King, supra.* The provisions in *Joy* were G.C. 1345-1g and 1346-4. The provisions construed in *Re Claim of King, supra,* were R.C. 4141.01(I) and 4141.28(O). In deciding *Re Claim of King, supra,* the Supreme Court stated:

> "Appellee's reliance on our decision in *Joy Mfg. Co. v. Albaugh* (1953), 159 Ohio St. 460, 112 N.E.2d 540, is misplaced. In that case we interpreted the predecessor statute to the current R.C. 4141.28(O). The earlier statute did not so clearly mandate that the administrator of the Bureau of Employment Services be served with notice, as does the present statute." (At 201-202)

(b) The statute in *Bouie* was a criminal statute; that in the instant case involved a civil appeal. The fact that the statute in *Bouie* was criminal was noted by this Court as a decisive factor, the Court stating:

> "The basic principle that a criminal statute must give fair warning of the conduct that it makes a crime has often been recognized by this Court." (At 350-51)

The Court concluded:

> "The crime for which these petitioners stand convicted was 'not enumerated in the statute' at the time of their conduct. It follows that they have been deprived of liberty and property without due process of law in contravention of the Fourteenth Amendment." (At 363)[2]

---

2. The two other cases cited by the Appellant are clearly inapplicable. In *Saunders v. Shaw* (1917) 244 U.S. 317, a party to litigation was denied an opportunity to present evidence relevant to the issue in the case. In his motion for rehearing in the instant case, the Appellant applied for leave to prove that he notified the Administrator of the pendency of the appeal. As indicated above, such notification would not make the Administrator a party to the proceeding, as required by the statute, and therefore, would not be relevant to the issue in the instant case.

In *Missouri v. Gehner* (1930) 281 U.S. 313, it was held that under certain circumstances, a contention properly can be raised for the first time in a petition for rehearing. In the instant case, the Appellees do not assert that the Appellant had no right to raise the notice question for the first time in his motion for rehearing. The Appellees assert that the contention thus advanced, for reasons indicated above, was irrelevant and immaterial, and, therefore, did not justify further hearing by the Court.

III

CONCLUSION

For reasons set forth above, it is evident that this appeal presents no substantial federal question. Therefore, the motion to dismiss should be granted or, in the alternative, the decision of the Supreme Court of Ohio should be affirmed.

Respectfully submitted,

J. MACK SWIGERT
600 Dixie Terminal Building
Cincinnati, Ohio 45202
Attorney for Defendants-Appellees

APPENDIX 1

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CASE NO. A7609115

ROBERT C. SULLIVAN, Agent for Pipe Fitter Claimants, 1228 Central Parkway, Cincinnati, Ohio 45210,
Plaintiff-Appellant,

-vs-

KAISER ENGINEERS, INC., P. O. Box 201, Moscow, Ohio 45153, and OBERLE-JORDRE ENGINEERING & ERECTORS, Tri-State Building, 432 Walnut Street, Cincinnati, Ohio 45202, and POWER PIPING, INC., 829 Beaver Avenue, Pittsburgh, Pennsylvania 15223,
Defendants-Appellees.

NOTICE OF APPEAL FROM DECISIONS OF BOARD OF REVIEW, OHIO BUREAU OF EMPLOYMENT SERVICES

(Filed November 5, 1976)

Pursuant to Sections 4141.28(O) and (P) of the Ohio Revised Code, plaintiff-appellant hereby appeals from the following decisions of the Board of Review, Ohio Bureau of Employment Services, mailed October 15, 1976, disallowing further appeal and affirming the decision of its Referee disallowing unemployment compensation benefits to the within claimants, copies of which are attached to this Notice of Appeal, incorporated by reference, and identified as Exhibits "A", "B", "C", "D", "E", "F", "G", "H", "I", "J", "K", and "L" respectively:

Exhibit	Claimant	Employer	Appeals Docket No.
"A"	Paul E. Abbott, et al.	Kaiser Engineers, Inc.	423777-M-BR, et al. 4040-76
"B"	Roger D. Adams, et al.	Power Piping, Inc.	423435-M-BR, et al. 4039-76
"C"	John J. Bose	Kaiser Engineers, Inc.	423811-BR 4045-76
"D"	Ronald F. Bryant, et al.	Oberle-Jordre Engineering & Erectors	422125-M-BR, et al. 4038-76
"E"	Larry L. Chaney	Power Piping, Inc.	423450-BR 4042-76
"F"	Larry L. Chaney	Power Piping, Inc.	423451-BR 4043-76
"G"	Edward J. Dapper	Kaiser Engineers, Inc.	423919-BR 4047-76
"H"	Sidney W. Freeman	Kaiser Engineers, Inc.	423956-BR 4048-76
"I"	Charles R. McGowan	Kaiser Engineers, Inc.	424181-BR 4053-76
"J"	William A. O'Hearn	Kaiser Engineers, Inc.	424213-BR 4054-76
"K"	Richard W. Rummel	Kaiser Engineers, Inc.	424334-BR 4055-76
"L"	Nathan D. Sowels	Power Piping, Inc.	423530-BR 4044-76

Plaintiff-appellant is Business Manager of Pipe Fitters Union Local No. 392 and files this Notice of Appeal pursuant to Section 4141.28(P) of the Ohio Revised Code, as agent for all claimants who are parties constituting the class and group of claimants adversely affected by the decisions of the Board of Review set forth in Exhibits "A" through "L" attached hereto.

Plaintiff-appellant contends that the Board's application of the "labor dispute" disqualification provision in these decisions denying benefits to claimants, is an erroneous interpretation of Section 4141.29(D)(1)(a) of the Ohio Revised Code, is violative of the public policy of Ohio, and unconstitutionally deprives claimants of equal protection and due process of law as guaranteed to them under the Constitutions of the State of Ohio and the United States of America.

Plaintiff-appellant further contends that the Board's Referee committed error prejudicial to claimants at the hearing held on these cases on January 27, 1976, in failing to rule upon specific objections made on behalf of claimants to certain evidence and in admitting into evidence improper and objectionable matter, thereby depriving claimants of due process of law.

Plaintiff-appellant says that the decisions of the Ohio Board of Review as set forth in Exhibits "A" through "L" attached hereto were unlawful, unreasonable, and/or against the manifest weight of the evidence, and that said decisions should be reversed, vacated and final judgment entered in favor of claimants represented by plaintiff-appellant.

/s/ Harold G. Korbee
Harold G. Korbee,
Trial Attorney for Plaintiff-Appellant
Six East Fourth Street
Cincinnati, Ohio 45202
(513) 381-2121

Of Counsel:
Brown, Korbee, Cummins
& Brown
Six East Fourth Street
Cincinnati, Ohio 45202
(513) 381-2121

PROOF OF SERVICE

I hereby certify that a copy of the within Notice of Appeal was served upon the following persons by registered mail to their last known address this 5th day of November, 1976:

1. Ohio Board of Review
   Ohio Bureau of Employment Services
   P.O. Box 1618
   145 South Front Street
   Columbus, Ohio 43216

2. Kaiser Engineers, Inc.
   P.O. Box 201
   Moscow, Ohio 45153

3. Oberle-Jordre Engineering & Erectors
   Tri-State Building
   432 Walnut Street
   Cincinnati, Ohio 45202

4. Power Piping, Inc.
   829 Beaver Avenue
   Pittsburgh, Pennsylvania 15223

5. William K. Engeman,
   Attorney at Law
   Taft, Stettinius & Hollister
   Attorneys for Kaiser Engineers, Inc.,
   Oberle-Jordre Engineering & Erectors and
   Power Piping, Inc.
   600 Dixie Terminal Building
   49 East Fourth Street
   Cincinnati, Ohio 45202

/s/ Harold G. Korbee
Harold G. Korbee,
Trial Attorney for Plaintiff-Appellant
Six East Fourth Street
Cincinnati, Ohio 45202
(513) 381-2121

APPENDIX 2

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CASE NO. A7609115

ROBERT C. SULLIVAN, Agent for Pipe Fitter Claimants,
1228 Central Parkway, Cincinnati, Ohio 45210,
Plaintiff-Appellant,

-vs-

KAISER ENGINEERS, INC., et al., P.O. Box 201,
Moscow, Ohio 45153,
Defendants-Appellees.

MOTION-PETITION OF PLAINTIFF TO ADD NEW PARTY DEFENDANT

Pursuant to Ohio Rules of Civil Procedure and Section 4141.28(O) of the Ohio Revised Code, plaintiff-appellant moves and petitions the Court for an order making the Board of Review, Ohio Bureau of Employment Services, 145 South Front Street, P.O. Box 1618, Columbus, Ohio 43216, an additional party defendant in this appeal action.

/s/ Harold G. Korbee
Harold G. Korbee, Trial Attorney
for Plaintiff-Appellant
Six East Fourth Street
Cincinnati, Ohio 45202
(513) 381-2121

MEMORANDUM

Plaintiff-appellant filed this action on November 5, 1976, pursuant to Sections 4141.28(O) and (P) of the Ohio Revised Code, appealing from certain decisions of the Ohio Board of Review.

Under the applicable statute, Ohio Revised Code 4141.28(O), the Board of Review is not a necessary or mandatory party defendant. But "after an appeal has been filed in the court, the board may, by petition, be made a party to such appeal."

On November 5, 1976, the Board of Review was served with a copy of the notice of appeal in this action and a demand for a certified transcript of proceedings before the Board of Review.

Although Section 4141.28(O) of the Ohio Revised Code requires the Board of Review to file with the Clerk a certified transcript of the record of the proceedings before the Board within 30 days after the filing of such demand, the Board has failed to file such transcript as of January 21, 1977.

Plaintiff-appellant respectfully requests that the Court order that the Board of Review, Ohio Bureau of Employment Services be named as an additional party defendant in this appeal action.

/s/ Harold G. Korbee
Harold G. Korbee,
Trial Attorney for Plaintiff-Appellant
Six East Fourth Street
Cincinnati, Ohio 45202
(513) 381-2121

NOTICE OF HEARING

Please take notice that the foregoing Motion-Petition will be heard on February 3, 1977 at 3:00 p.m. before Hon. Robert L. Black, Judge of the Court of Common Pleas, Hamilton County Court House, Court and Main Streets, Cincinnati, Ohio 45202.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion and Memorandum was served upon the Board of Review, Ohio Bureau of Employment Services, P.O. Box 1618, 145 South Front Street, Columbus, Ohio 43216 by certified mail and upon J. Mack Swigert, Esq., Attorney for Kaiser Engineers, Inc., Oberle-Jordre Engineering & Erectors, and Power Piping, Inc., by ordinary mail this 24th day of January, 1977.

/s/ Harold G. Korbee
Harold G. Korbee,
Trial Attorney for Plaintiff-Appellant
Six East Fourth Street
Cincinnati, Ohio 45202
(513) 381-2121

APPENDIX 3

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CASE NO. A7609115

ROBERT C. SULLIVAN, Agent for Pipe Fitter Claimants,
Plaintiff-Appellant,

-vs-

KAISER ENGINEERS, INC., et al.,
Defendants-Appellees.

ENTRY MAKING BOARD OF REVIEW, OHIO BUREAU OF EMPLOYMENT SERVICES, ADDITIONAL PARTY DEFENDANT-APPELLEE

This matter came on for hearing before the Court on February 3, 1977, upon the motion of plaintiff-appellant petitioning the Court to add the Board of Review, Ohio Bureau of Employment Services, as an additional party defendant pursuant to Section 4141.28(O) of the Ohio Revised Code.

Based upon the motion, memorandum and argument, the Court finds plaintiff's motion well taken and hereby orders that the Board of Review, Ohio Bureau of Employment Services, 145 South Front Street, P.O. Box 1618, Columbus, Ohio 43216, be, and hereby is, made an additional party defendant-appellee in this action.

It is further ordered that a copy of this order be served upon the Board of Review, Ohio Bureau of Employment

Services, by plaintiff-appellant or his legal representative, by certified mail, on or before February 15, 1977.

.....

/s/ Harold G. Korbee
Harold G. Korbee,
Trial Attorney for Plaintiff-Appellant
Six East Fourth Street
Cincinnati, Ohio 45202
(513) 381-2121

.....

J. Mack Swigert
Trial Attorney for Defendants-Appellees
Taft, Stettinius & Hollister
600 Dixie Terminal Building
Cincinnati, Ohio 45202

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

Supreme Court, U.S.
FILED
NOV 25 1980
MICHAEL RODAK, JR., CLERK

Case No. 80-662

ROBERT C. SULLIVAN,
Agent for Pipe Fitters Claimants,
Petitioners,

v.

ALBERT G. GILES,
Administrator, Ohio Bureau of Employment Services, et al.,
Respondents.

ON APPEAL FROM
THE SUPREME COURT OF OHIO

MOTION TO DISMISS OR AFFIRM AND BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

WILLIAM J. BROWN
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145 South Front Street
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Attorneys for Respondents

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

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ROBERT C. SULLIVAN,
Agent for Pipe Fitters Claimants,

Petitioners,

v.

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Administrator, Ohio Bureau of Employment Services, et al.,

Respondents.

ON APPEAL FROM
THE SUPREME COURT OF OHIO

MOTION TO DISMISS OR AFFIRM AND BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF THE CASE

On November 5, 1976, Robert C. Sullivan, Appellant herein, filed a "Notice of Appeal" to the Common Pleas Court of Hamilton County, Ohio from a decision of the Unemployment Compensation Board of Review of the State of Ohio. At the time of the filing of this appeal the Appellant failed to name Albert G. Giles, Administrator of the Ohio Bureau of Employment Services as a party-appellee and similarly failed to serve said Notice upon him as required by Section 4141.28 (O), Ohio Revised Code. Thereafter, on February 22, 1977, after finding out about the appeal through informal means, Mr. Giles petitioned the court to be made a party. The appeal progressed through the State Court system of Ohio and was ultimately lodged in the Ohio Supreme Court. While pending consideration before that Court, the failure to name and serve Administrator Giles at the outset was discovered and a motion to dismiss was filed and granted by the Court based solely on state law.

THIS COURT LACKS JURISDICTION TO REVIEW STATE COURT DECISIONS RESTING ON ADEQUATE STATE GROUNDS.

In the case of *Herb v. Pitcairn,* 324 U.S. 117 (1954) Justice Jackson, speaking for the Court stated that this Court has, from the time of its foundation adhered to the principal that it will not review judgments arising out of the state courts which rest on adequate and independent state grounds. In more recent years, this Court has held that no review will lie where a party has merely failed to abide by a state procedural requirement because such matters are adequate state grounds. [See *Michigan v. Tyler,* 436 U.S. 499 (1978); *Parker v. North Carolina,* 397 U.S. 790 (1970].

In the instant case the Appellant's case was dismissed because of his failure to follow the simply procedural requirements of Section 4141.28 (O), Ohio Revised Code.

The jurisdiction of all Ohio Courts is necessarily derived from the Constitution of Ohio.

Article IV, Section 4 (B) of the Constitution provides:

> The courts of common pleas and divisions thereof shall have such original jurisdiction over all justicable matters and such powers of review of proceedings of administrative officers and agencies *as may be provided by law.* (Emphasis added)

The emphasized clause has been interpreted to mean that only the General Assembly may grant common pleas courts the jurisdictior to hear administrative appeals. In *Shady Acres Nursing Home, Inc. v. Board of Building Appeals,* 50 Ohio App. 2d 391 (Lake Cty., 1976), *Motion to Certify overruled,* 12-31-76, it was held that a new trial was not available upon judicial review of an administrative agency determination because a new trial had not been specifically provided by the General Assembly. The Court noted that by virtue of Article IV, Section 4 (B), courts of common pleas are courts of *limited* jurisdiction with regard to administrative appeals, and exercise jurisdiction in such cases only pursuant to specific statutory grants of jurisdiction.

The Ohio Supreme Court has also recognized that only the General Assembly may grant jurisdiction to courts to hear special statutory proceedings. In *Malloy v. City of Westlake,* 52 Ohio St. 2d 103 (1977) it was held:

> The law is clear in Ohio that special statutoy provisions, if jurisdictional, are substantive laws of the state anc cannot be abridged, enlarged, or modified by the Ohio Rules of Cviil Procedure. (52 Ohio St. 2d 103, 104-105)

See also *Akron v. Gay,* 47 Ohio St. 2d 164 (1976). While both of these cases are rooted in Article 4, Section 5 (B), they make it plain that the jurisdictional requirements of special statutory proceedings are derived solely from the Revised Code.

Thus, Section 4141.28 (O), Revised Code, defines the limit of the subjct matter jurisdiction of the Common Pleas Court in this matter.

In granting ourts of Common Pleas the jurisdiction to hear unemployment compensation appeals, the General Assembly set forth several jurisdictional prerequisites. In pertinent part Section 4141.28 (O) provides:

> An interested party may, within thirty days after notice of the decision of the board was mailed to the last known post office address of all interested parties, appeal from the decision of the board to the court of common pleas of the county wherein the appellant, if an employee, is resident or was last employed or of the county wherein the appellant, if an employer, is resident or has his principal place of business in this state. Such appeal *shall* be taken within such thirty days *by the appellant by filing a notice of appeal* with the clerk of the court of common pleas, with the board, and *upon all appellees,* by certified mail to their last known post office address.
>
> * * *

> *All other interested parties before the board or the referee shall be made appellees.* (Emphasis added)

"Interested party" is a term defined by the Ohio Revised Code. Section 4141.01 (I) provides:

> " *'Interested party' means the administrator* and any party to whom notice of a determination of an application for benefit rights or a claim for benefits is required to be given under Section 4141.28 of the Revised Code." (Emphasis added)

Section 4141.28 (O) is quite clear in stating that a copy of the Notice of Appeal *must* be filed with the Administrator within thirty (30) days of the mailing of the Board's decision. In the instant case the decision of the Board of Review was mailed on October 15, 1976; but the Appellant's Notice of Appeal was never filed with the Administrator.

The Ohio Supreme Court has held that a timely filing of the Notice of Appeal with all "interested parties" is a condition precedent to subject matter jurisdiction (See *Todd v. Garnes,* (1975) 44 Ohio St. 2d 56; *In re Claim of King,* (1980) 62 Ohio St. 2d 87; *Sullivan v. Kaiser Eng.* (1980) 62 Ohio St. 2d 304.

This interpretation of 4141.28 (O), Ohio Revised Code, has been universally followed in Ohio in the following cases, which are cited not as authority, but to show their number: *U.S. Steel v. Board of Review,* Lorain No. 2967 (9th Dist. Ct. App., May 14, 1980); *Joseph Bagdonas v. Board of Review,* Summit Cty. 9648 (9th Dist. Ct. App., May 28, 1980); *William J. Leitold v. Board of Review,* Cuyahoga Cty. No. 41852 (8th Dist. Ct. App., June 19, 1980); *Maria F. Montoya v. Stokely Van Camp,* Lucas Cty. No. L-79-354 (6th Dist. Ct. App. June 13, 1980), and *In re Calim of Lowell S. Chapman,* Columbiana Cty. No. 79-C-35 (7th Dist. Ct. App., June 27, 1980); *David Å. Romstadt v. Little Sisters of the Poor,* No. 80-437 (Ohio Supreme Ct., unreported, (1980)); and *In re claim of Vanessa T. Woolfork,* No. 2996 (9th Dist. Ct. App., September, 1980).

THE APPELLANT HAS FAILED TO FRAME A CONSTITUTIONAL ISSUE.

The Appellant herein has failed to come forward with any coherent constitutional theory and has, similarly, failed to enunciate which of numerous tests he would wish to see this Court apply. It has long since been established that to establish a constitutional challenge, a party must do more than merely mumble the mystic incantation of "due process"; he must clearly establish the elements of his theory (See *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61).

To the extent that the Appellant has raised an issue concerning notice to the Administrator, he has failed to address the fact that Section 4141.28 (O), Ohio Revised Code, requires that the Administrator, as trustee of the unemployment trust fund, must be *named* as a party since a judgment is not enforceable against a non-party. (See *Hansberry v. Lee,* 311 U.S. 22).

CONCLUSION

It is respectfully submitted that the decision of the Ohio Supreme Court was correct and should be affirmed or, in the alternative, that the Appellant's appeal should be dismissed because of a lack of a substantial federal question.

Respectfully submitted,

WILLIAM J. BROWN
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Attorneys for Respondent

APPENDIX A

Section 4141.28 (I), Ohio Revised Code

(I) "Interested party" means the administrator and any party to whom notice of a determination of an application for benefit rights or a claim for benefits is required to be given under section 4141.28 of the Revised Code.

APPENDIX B

Section 4141.28 (O), Ohio Revised Code

(O) Any interested party may, within thirty days after notice of the decision of the board was mailed to the last known post office address of all interested parties, appeal from the decision of the baord to the court of common pleas of the county wherein the appellant, if an employee, is resident or was last employed or of the county wherein the appellant, if an employer, is resident or has his principal place of business in this state. Such appeal shall be taken within such thirty days by the appellant by filing a notice of appeal with the clerk of the court of common pleas, with the board, and upon all appellees by registered mail to their last known post office address. Such notice of appeal shall set forth the decision appealed from and the errors therein complained of. Proof of the filing of such notice with theboard shall be filed with the clerk. All other interested parties before the board or the referee shall be made appellees. The board upon written demand filed by an appellant shall within thirty days after the filing of such demand file with the clerk a certified transcript of the record of the proceedings before the board pertaining to the decision complained of, and the appeal shall be heard upon such record certified by the board. A bill of exceptions shall not be required. After an appeal has been filed in the court, the board may, by petition, be made a party to such appeal. If the court finds that the decision was unlawful, unreasonable, or against the manifest weight of the evidence, it shall reverse and vacate such decision or it may modify such decision and enter final judgment in ar ordance with such modification; otherwise such court shall affirm such decision. Any interested party shall have the right to appeal from the decision of the court as in civil cases, provided a bill of exceptions shall not be required at any level of appeal.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief in Opposition to Petition for Certiorari to the Supreme Court was sent this _____ day of _____ 1980 to Harold G. Korbee, Counsel for Appellant, 817 Fourth and Race Tower, 105 West Fourth Street, Cincinnati, Ohio 45202 and to J. Mack Swigert 600 Dixie Terminal Building, Cincinnati, Ohio 45202 Counsel for Employer Appellees.

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